No. 83-283

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KAHALA COMMUNITY ASSN, INC., et al.,
Appellants

v.

FRANK E. MIDKIFF, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

JAMES H. CASE
A. BERNARD BAYS*
EDWARD E. CASE
Carlsmith, Carlsmith,
Wichman and Case
2200 Pacific Trade Center
190 South King Street
Honolulu, Hawaii 96813
Tel. No.: (808) 523-2500

Counsel for Appellants
Kahala Community Assn.,
Inc., et al.

* Counsel of Record

QUESTION PRESENTED

Whether there are no conceivable social and economic problems, including those specifically identified by the Hawaii State Legislature in enacting the Hawaii Land Reform Act, which a State may correct by the compensated taking of a private property interest and subsequent transfer of that interest to others.* **

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* Plaintiffs below were Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson acting as the Trustees of the Bishop Estate ("Bishop Estate" or "Estate"). Mr. Ching has since been succeeded by William S. Richardson. Mr. Midkiff died on August 7, 1983; his successor trustee has not yet been named. The present trustees are appellees before this Court.

The state defendants below were the Hawaii Housing Authority ("HHA"), the Commissioners of the HHA (Paul A Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N. C. Ing, Nobuyoshi Tamura, Andrew I. T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y. K. Sunn). At the time this

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Jurisdictional Statement is being filed, Commissioners Tom, Tamura, and Chang have been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom has succeeded Mr. Sunn as Executive Director. The HHA, its Commissioners, and its Executive Director are appellants before this Court.

Intervenors-defendants given leave to intervene by the district court below were the following lessee associations: Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund; Wai-Kahala Tract "H" Association, Inc; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahaione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/ Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; and Halawa Valley Estates Fee Conversion Corporation. All intervenors-defendants with the exception of Halawa Valley Estates Fee Conversion Corporation are appellants before this Court.

Counsel of Record for appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund also represent the following community associations in matters relating to the Hawaii Land Reform Act: Lunalilo Park, Kaonohi Ridge, Waialae Nui Valley, Waialae Nui Ridge, Ainakoa, Haiku Park, Crown Haiku, Waialae Iki View Lots, and Enchanted Lakes.

** Appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund adopt by reference the second of the two Questions Presented by appellants Hawaii Housing Authority, et al. in their Jurisdictional Statement filed with this Court on August 1, 1983 and all discussion of such question in that jurisdictional statement.

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No. 83-141

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, et al.,

Appellants,

v.

FRANK E. MIDKIFF, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit reversing the United States District Court for the District of Hawaii and holding the

Hawaii Land Reform Act facially violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

OPINIONS BELOW

The March 28, 1983 decision of the United States Court of Appeals for the Ninth Circuit from which this appeal is taken is reported as Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983) (Alarcon, J.; Poole, J., concurring; Ferguson, J., dissenting), and is reprinted as Appendix A to the Jurisdictional Statement of appellants Hawaii Housing Authority, et al., filed with this Court on August 1, 1983.* That decision reversed a final

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* The appendices to the Jurisdictional Statement of appellants Hawaii Housing Authority, et al. are incorporated herein, and all references herein to appendices refer to such incorporated appendices with the exception of Appendix M, which is attached to this Jurisdictional Statement. Pages in the incorporated appendices are referred to herein by the letter "A", followed by the page number.

judgment of the United States District Court for the District of Hawaii (King, J.) dated June 27, 1983 and reprinted as Appendix D. The District Court's judgment followed two earlier decisions: (a) a December 19, 1979 decision granting partial summary judgment to appellants reported at 483 F. Supp. 62 (D. Hawaii 1979) and reprinted as Appendix B; and (b) a May 8, 1979 decision on appellees' motion for preliminary injunction reported at 471 F. Supp. 871 (D. Hawaii 1979) and reprinted as Appendix C.

JURISDICTION

Appellees Frank E. Midkiff, et al. filed this action in the United States District Court for the District of Hawaii under 28 U.S.C. §§ 1331, 1343, and 2201, and 42 U.S.C. § 1943. They sought a declaratory judgment of the facial unconstitutionality of Haw. Rev. Stat. ch. 516, the Hawaii Land Reform Act ("Act"), and injunctive relief against any further state action pursuant to the Act. In granting partial summary judgment to appellants, the district court rejected appellees' claim that the Act contravened the Fifth and Fourteenth Amendments to the United States Constitution. See Appendix B.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding the Act per se violative of the Fifth and Fourteenth Amendments. See Appendices A and D.

Rehearing was denied by order filed June 17, 1983. See Appendix E. Appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund timely filed their Notice of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit on July 19, 1983.* See Appendix M.

Because the decision of the Ninth Circuit held a state statute invalid as repugnant to the Constitution of the United States, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(2).

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*Two other groups of defendants and intervenors-defendants have filed separate Notices of Appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, is reprinted in full as Appendix G. The text of the original Act, 1967 Haw. Sess. Laws Act 307, is reprinted in relevant part as Appendix H. Those portions of the 1975 amendments to the Act, 1975 Haw. Sess. Laws Acts 184, 185 and 186, which

contain legislative reaffirmance and supplementation of the legislative findings and declarations of necessity and purpose set forth in the original Act and at Haw. Rev. Stat § 516-83, are reprinted as Appendices I, J, and K, respectively. The Hawaii Eminent Domain Law, Hawaii Rev. Stat. ch. 101, is reprinted as Appendix L.

STATEMENT OF THE CASE

Severe social and economic problems resulting directly from a unique confluence of geography and historical development led the Legislature of the State of Hawaii to enact the Hawaii Land Reform Act in 1967. The Act aimed to broaden an incredibly narrow base of land ownership through State acquisition of certain residential leasehold land by eminent domain and subsequent sale of such land to the individuals owning homes on that land. The question presented is whether this carefully crafted legislative solution to the problems caused by Hawaii's unique residential leasehold system is void because the State, regardless of the Act's compelling public purposes, could not utilize the power of eminent domain in this fashion.

The ramifications of such absolute preclusion become apparent only when considered in light of the facts and circumstances giving rise to the problems which required legislative action. Those facts and circumstances and the nature of the problems they posed to modern Hawaii were apprehended by the legislature following decades of study and were recorded in extensive detail in specific legislative findings and declarations of necessity and purpose included in the original Act[1] and in subsequent amendments.[2] What the legislature perceived was that the

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[1] See 1967 Haw. Sess. Laws Act 307, A 141-143, and Haw. Rev. Stat. § 516-83, A 136-140.

[2] See 1975 Haw. Sess. Laws Act 184, § 1, A 144-146, and 1975 Haw. Sess. Laws Act 185, § 1, A 147-151.

system of land ownership in Hawaii is "oligopolistic,"[3] so little changed from Hawaii's monarchial past when the King owned all land that merely 22 private persons or entities owned no less than 72.5% of all land on the most populous island of Oahu alone.[4]

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[3] See 1975 Haw. Sess. Laws Act 185, A 147, 149, and Midkiff v. Amemiya, Civil No. 47103 (Haw. Cir. Ct. June 29, 1978) (Findings of Fact Nos. 118-119).

[4] See 1975 Haw. Sess. Laws Act 184, A 144, and 1975 Haw. Sess. Laws Act 185, A 147. The extent of the large landowners' hold on private land ownership was further documented in Midkiff v. Amemiya, supra n.3, a state court case considering the constitutionality of the Act's sister statute. The extensive Findings of Fact made by the court in that case included the facts that the twelve largest private landowners in the state owned 53.5% of all land on Oahu and 78.1% of all of Oahu's private land (Findings of Fact Nos. 94 and 95), and the appellees Bishop Estate, the largest private landowner in the state, itself owned 22.1% of all private lands on Oahu (Finding of Fact No. 97). The court reached the same conclusion as did the legislature that this system of ownership was "oligopolistic" and "quasi-monopolistic." (Findings of Fact Nos. 118 and 119.)

Proceeding further in this analysis, the legislature identified the manner in which the large landowners' overwhelming control of land ownership was exercised. It found that the large landowners, rather than selling their lands, had engaged and would continue to engage in a consistent practice of leasing those lands under long-term leases.[5] The immediate effect of this consistent policy, the legislature concluded, was to preclude large segments of Hawaii's population from owning the land under their homes.[6]

Pursuing its study still deeper, the legislature found that this

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[5] See Haw. Rev. Stat. § 516-83(a)(1), A 136.

[6] See 1967 Haw. Sess. Laws Act 307 § 1(e), A 142, 1975 Haw. Sess. Laws Act 184 § 1(b), A 144, and Midkiff v. Tom, 483 F. Supp. 62, 65, A 65. In 1972, 31.1% of owner-occupied housing on Oahu was on leasehold land. 1975 Haw. Sess. Laws Act 185 § 1, A 148.

centrally controlled residential leasehold system had caused serious problems much more comprehensive than any vague lament as to the availability of house-lot ownership. Rather, said the legislature, with this serious "shortage of fee simple residential land" came an "artificial inflation of residential land values . . . ."[7] That inflation, in turn, contributed significantly to a high cost of living which, "f]or a growing proportion of Hawaii's people, quite possibly a majority, . . . is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services."[8]

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[7] See Haw. Rev. Stat. § 516-83(a)(4), A 137.

[8] See Haw. Rev. Stat. § 516-83(b), A 137.

Alleviation of these conditions, the legislature concluded, would "promote the economy of the State and the public interest, health, welfare, security and happiness of the people. . . ."[9] But if these conditions were not corrected, the legislature believed, they could

> create such a large portion of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people.[10][11]

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[9] See Hawaii Rev. Stat. § 516-83(a)(5), A 137.

[10] See Hawaii Rev. Stat. § 516-83(a)(7), A 138.

[11] These were no idle fears. In 1976 and 1977, for example, dissatisfied tenants in Waiahole-Waikane on Oahu who did not qualify for fee purchase under the Act for various reasons, including the fact that their leases had actually expired, staged a rent strike against the single landowner, blocked highways, burned eviction notices, and refused to leave. See Tenants Won't Budge -- Next Move Is Up To ...?, Honolulu Advertiser, January 4, 1977, at A1, col. 2, and The "War" of Waiahole, id. at A3, col. 2. The

The best overall solution to these pressing problems, the legislature concluded, was to effect certain transfers of land ownership. The optimum means, it felt, were takings pursuant to the eminent domain power.

The extensive findings and conclusions resulted from legislative study and analysis spanning decades and including active input from all affected segments of Hawaiian society. Appellees'

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[11] (cont'd)

threat of violence was averted only when the State, exercising its general eminent domain powers, condemned the area: "The Hawaii Housing Authority yesterday paid $6 million in exchange for the deed to 600 acres in Waiahole Valley. Payment of the state housing fund to Elizabeth Marks means that the state is now officially the owner of the Windward Oahu valley where a year ago tenants were carrying on a bitter eviction fight. Earlier this year, Gov. George Ariyoshi announced that the state would buy the land. The decision averted possible confrontation between the tenants and the police over evictions." State Now Owns Waiahole Valley, Honolulu Advertiser, December 1, 1977, at A13, col. 1.

and the other large landowners' role in fashioning this legislative response was fully commensurate with the degree to which they were affected.[12] For over 10 years they successfully blocked enactment of any legislation to address the problems caused by the residential leasehold system.[13] They ultimately

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[12]Indeed, it is naive to ignore the tremendous political power of an exclusive group owning over three-quarters of all private land on Oahu, and that group's willingness to fully exercise such power in relevant legislative matters. For example: "A legislator once called it 'Hawaii's other government.' It's the giant landowners, the Bishop Estate, and the jobs held by its five voting trustees are among the most desired and challenging in Hawaii." Bishop Estate: A Job at the Top, Honolulu Advertiser, April 25, 1982, at A-3, col. 1. Or: "In Hawaii, only the government has more power and influence than the five-member board of trustees of the Bishop Estate." Tangled in Hawaiian Politics, Wealthy Estate Gains Strength, Raleigh, N.C. News & Observer, July 17, 1983, at A18, col. 1.

[13]In 1963, for example, an effort to enact the Maryland system of land reform providing for options for lessees to purchase their leasehold was defeated. See 1963 Hawaii House Bill Nos. 24 and 409.

acquiesced to the 1967 Act in part because the choice of eminent domain to carry out the Act's purposes allows them to shift investments while avoiding adverse tax consequences.[14] And they have continued their involvement in the process of legislative fine-tuning, gaining the enactment of several amendments addressing their legitimate concerns about the fairness and workability of the Act.[15]

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[14] See Hawaii Rev. Stat. § 516-27, A 121.

[15] See, e.g., 1975 Hawaii Sess. Laws Act 184 § 2(8) and 1980 Hawaii Sess. Laws Act 107, § 4, deleting the mandatory arbitration provisions and amending the mandatory valuation formulas which were objected to by Appellees in the District Court below, and 1983 Hawaii Sess. Laws Acts 203 and 204, changing, inter alia, the valuation date from the date of designation to the date of summons in response to the Appellees contention that it was unfair to use the designation date for valuation and adding provisions to facilitate a negotiated sale prior to the filing of a condemnation action.

Despite their direct involvement in this legislative effort, the large landowners, following the Act's enactment, continued their residential leasehold development practices.[16] In fact, Appellees actually accelerated their development of residential leasehold tracts and refused to sell existing tracts to the lessees.[17] This course of action was based upon Appellees contention that any law affecting the residential leasehold system was per se unconstitutional, and that they were absolutely entitled to continue that system regardless of the social and economic cost to the state as a whole.

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[16] See Haw. Sess. Laws Act 184 § 1(b), A 144.

[17] Midkiff v. Amemiya, supra, n.3 (Findings of Fact 28): "[D]evelopment of new leasehold subdivision on Bishop Estate land was actually accelerated and, as a result, new single family housing in the suburbs around Honolulu generally became even more predominantly leasehold."

On February 28, 1979, more than a decade after the Act's passage, Appellee Bishop Estate filed this action for declaratory and injunctive relief in the United States District Court for the District of Hawaii. Rather than questioning the validity of the extensive legislative findings and declarations of necessity and purpose, the Estate alleged that the Act was facially violative of the Fifth and Fourteenth Amendments to the United States Constitution because it deprived "the Trustees of their property only for private use, and not for public use . . . ." (Complaint, Paragraph 14.) That allegation was denied by both defendants-appellants Hawaii Housing Authority, et al. (Answer, Paragraph 18), and by subsequent intervenors-appellants Kahala

Community Assn. Inc., et al. (Answer, Paragraph 3.)

Subsequently, defendants and intervenor-defendants moved for partial summary judgment on the issue of whether the Act was within the purview of the state's police power and whether the use of eminent domain was for a public purpose. In opposition, appellees offered little if any competent evidence to dispute the detailed legislative findings and declarations of necessity and purpose. Instead, they chose to stand on their contention that the Act was facially unconstitutional regardless of the validity of the legislative findings and conclusions.[18]

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[18] In Midkiff v. Amemiya, supra n.3, appellees had undertaken an extensive effort to disprove

On December 9, 1979, the District Court granted partial summary judgment in favor of the defendants and the intervenors-defendants on the issue of the Act's constitutional validity. The Court held that so long as the purpose of the Act was a valid exercise of the State's police powers, the means chosen to accomplish that purpose were permissible if "rational and not in bad faith." 483 F. Supp. at 67; A 70. Considering the unrebutted legislative findings and declarations, it concluded that the legislature acted well within the

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[18](cont'd)

the legislative findings. That effort was wholly unsuccessful. The court there not only confirmed the legislative findings regarding the serious problems created by the residential leasehold system, but made new specific findings regarding the oppressive leasehold policies of the Appellees and their adverse effects. Perhaps this explains appellees' strategy before the lower court here.

ambit of its powers in determining that land redistribution was compelled, and that the legislature's choice of the means to this end--the power of eminent domain--had not been arbitrary. 483 F. Supp. at 67-70, A 70-75.

On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed. The Court's opinion (Alarcon, J.) held the Act facially invalid. By severing the purposes of the Act from the means employed, the Court saw only a required transfer of title from one private landowner to another. Thus, it held, the power of eminent domain could never be used as the Act had contemplated, regardless of the validity of the underlying public purposes.

In a concurring opinion, Judge Poole glanced at the extensive findings

of the legislature, and pronounced some personal doubts as to their validity although those findings were unrebutted on the record before him.[19] But, ultimately joining with the majority in considering the public purposes of the Act irrelevant, he saw only a facial invalidity. Id. at 807, A 38.

In dissent, Judge Ferguson refused to view the Act in such dismembered fashion. Instead, he felt, the

> real question in this case is not whether a naked transfer of title solely for a person's private use is an unlawful taking. The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands

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[19] "While the legislature finds a shortage of fee simple residential property, it is significant that there is a surplus of condominiums on the island." 702 F.2d at 807 n.9, A 38.

> of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage.

702 F.2d at 809, A 42. And, granting the legislature's decision the judicial deference to which it is entitled, id. at 814, A 50, he found the Act "well within constitutional limitations." Id. at 817, A 58. "[W]here property is taken to achieve such substantial benefits for the citizenry, the property is put to a public use." Id.[20]

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[20]The dissent quotes extensively from the following excellent article by a local commentator: Conahan, Hawaii's Land Reform Act: Is It Constitutional?, 6 Hawaii Bar Journal 31 (1969).

THE QUESTION IS SUBSTANTIAL

A. The Ninth Circuit's Inflexible Rule Is Contrary to All Relevant Precedent

Until the Ninth Circuit pronounced the outright unavailability of the power of eminent domain to effect the compensated transfer of a private property interest to another private entity to implement any conceivable public purpose, no court in this century had concluded that the Constitution mandated such a preclusion. Rather, every one of those courts had presumed the validity of eminent domain as a proper means, and had focussed instead on the legitimacy of the foundational facts and circumstances upon which the constitutionally required finding of public purpose is based.

These cases are extensively treated in the Jurisdictional Statement

of Appellants Hawaii Housing Authority, et al. filed herein, at pp. 10-23. But four in particular merit discussion here.

Berman v. Parker, 348 U.S. 26 (1954), involved the constitutionality of a land redevelopment statute which authorized the use of the power of eminent domain to condemn privately held slum areas, consolidate ownership and resell such areas to other private persons. This Court scarcely saw a need to address the question of whether eminent domain itself was a proper tool by which to effect the statute's professed public purposes. Rather, it stated: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear, for the power of eminent domain is merely the means to the end." Id. at 33.

In Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969), the Ninth Circuit considered the validity of a statute enacted to straighten municipal streets. Under the act, the government was authorized to exercise eminent domain over large private tracts, straighten the streets and lot lines, and resell the property to individuals. In discussing one condemnee's allegation that the power of eminent domain was not available to the government to effect the statute's professed public purpose, that court stated: "On urban renewal condemnations . . ., the whole scheme is for a public agency to take one man's property away from him and sell it to another. The founding fathers may have never thought of this, but the process has been upheld uniformly by latter-day judicial decision . . . . Berman v. Parker, [supra]."

In People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772 (1946), the Puerto Rican Legislature had concluded that the combination of a high concentration of land ownership and a dense island population had created serious economic and social problems. Id. at 325. It had therefore passed a number of statutes authorizing condemnation of large landholdings and resale to individuals in smaller parcels for residential and farming purposes. Id. at 318. The First Circuit, citing several decisions of this Court, rejected "[t]he argument . . . that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public." Id. at 323. The proper inquiry, it stated, was whether "[s]ome public

benefit or advantage . . . accrue[s] from the transfer," a question which local legislatures have "wide scope in deciding. . . ." Id.

Finally, in Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), the Supreme Court of Michigan considered the state constitutional validity of a statute authorizing the exercise of eminent domain by a state economic development corporation to "condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state. . . ." Id. at 457. The court did not even discuss the possibility that the use of eminent domain in such fashion might be precluded per se, but required only that the power of eminent domain be exercised "in a way that

benefits specific and identifiable public interests." Id. at 459.

The Ninth Circuit's response to such precedent is to portray the manner in which eminent domain is utilized by Hawaii's Land Reform Act as somehow distinguishable from all other modes of use where transfers of private property interests to other private persons have been upheld. 702 F.2d at 793-796, A 10-16. The "key in Berman," for example, is said to be "the intermediate step in which the property was transferred from the private owner to the government for a public purpose, i.e., the redevelopment of the area." Id. at 797, A 18. Berman is also said to involve [c]hanges in the use of condemned property . . . [,]" id. at 794, A 13. Eastern Sugar is stated to be inapplicable because it falls within that

acceptable category in which "the beneficiary of the condemnation is a governmental entity . . . [,]" id. at 795, A 14; this is said to be true of Eastern Sugar because there "the government could have remained in possession of the condemned land after condemnation." Id., A 15. And Guam v. Moylan is dismissed because there the condemnation of private land was characterized as for road building which, the court said, was one of the two major categories of eminent domain exercise where "the purpose of a taking has been historically deemed to be for the public. . . ." Id. at 794, A 12.

These attempts to distinguish all binding precedent fail for several reasons. The clearest of these deficiencies is the majority's misconstruction of the applicable facts both in the

authorities and in the workings of the Act. For example, in Guam v. Moylan the property taken was subsequently transferred to private ownership by others pursuant to the legislative purpose of reorganizing the municipal area; it was not merely used for roads. And while the key to Berman is said to lie in the intermediate transfer to the government for a public use, no recognition is given the facts that (a) the Act's public purposes are accomplished to some extent at the instant title is transferred from the appellees to the Hawaii Housing Authority, and (b) the Hawaii Housing Authority could condemn lands and, like a redevelopment agency, retain ownership.

But the most important of these deficiencies is the majority's failure to distill any consistent principles from these authorities and apply

them in a consistent fashion here. Rather, the majority's rule would lead to incredible inconsistencies in permissible applications of eminent domain powers which have no rational basis. For example, under the Ninth Circuit's view of the authorities, government could condemn a residential tract to demolish antiquated buildings and transfer the parcel to a private developer, but could not condemn leased fee interests to end an antiquated, socially harmful system of land ownership if such interests are subsequently transferred to private persons. Eminent domain could be used to consolidate land ownership for urban renewal or private plant expansion, but not to divide land ownership for no less compelling public purposes.

Viewed in this light, the rationale for the Ninth Circuit's conclusion does not rest on the absence of binding precedent. Rather, the rationale seems to be that this particular Act presents some unstated compelling reason requiring departure from precedent.

B. No Compelling Judicial Or Social Policy Considerations Justify The Ninth Circuit's Total Departure From Relevant Precedent Governing The Permissible Uses Of Eminent Domain To Implement Public Purposes Such As Those Of The Hawaii Land Reform Act

Case precedent must, of course, interact with what Chief Justice Holmes termed the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy. . . ." Holmes, The Common Law 1 (1881). It is

only through the blending of precedent and historical development that the twin goals of stability and flexibility in dealing with complex problems in a changing world are mutually advanced.

The Ninth Circuit, however, cites no compelling policy considerations to justify its total departure from nearly a century of judicial precedent holding that eminent domain can be used to effect private transfers of land to implement legitimate public purposes. Perhaps this omission was unavoidable, since judicial foreclosure of the use of eminent domain to solve serious social and economic problems such as those caused by Hawaii's residential leasehold system runs counter to several fundamental social and judicial policy considerations. These include:

(1) Decreasing unwarranted judicial intervention into legislative solutions. As this Court stated in Ferguson v. Skrupa, 372 U.S. 726, 729 (1963): "[I]t is up to the legislature, not courts, to decide on the wisdom and utility of legislation." This is precisely so that legislatures may have sufficient latitude to deal effectively with complex problems which can best be solved by obtaining input from all segments of society through the legislative process. And if a legislative solution does not work well or is unfair in its application, its deficiencies can usually best be corrected through that same process rather than by being struck down in toto by the courts.[21]

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[21] See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (legislature may implement program although its effectiveness is questionable in part because problems in the operation of the program can be corrected step by step through the legislative process).

As noted supra, n.15, the legislative process in Hawaii has been responsive to the legitimate concerns of Appellees regarding the fairness and workings of the Act. In response to the district court's decision that certain provisions of the original Act were objectionable, the legislature amended the Act to conform to the court's decision.

There is no indication that the state legislature and judicial processes will not continue to be responsive to Appellees' legitimate concerns with the Act's workings. Admittedly, no one in Hawaii involved in those processes and familiar with the situation is presently responsive to Appellees' empty arguments that the residential leasehold system is not really a problem or that the Act is per se invalid because the large landowners' choice of eminent

domain as the means of implementation is defective.

(2) Decreasing unwarranted federal intervention into state and local problems. This deference to state and local governments is especially great where the power of eminent domain is involved. See, e.g., Clark v. Nash, 198 U.S. 361, 368-70 (1905) (unique local conditions to be accorded paramount importance in resolving questions regarding the permissible uses of eminent domain). The reason for this policy is simple: Those who are closer to the problems and are directly affected by them are better able to provide fair, workable solutions which they can live with.[22]

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[22] See, e.g., John Naisbitt, Megatrends (1982), pp. 101-112.

Hawaii's widespread residential leasehold system is a perfect example of a unique, incredibly complex local problem which is not shared by any other state or understood by the people living in other states. The legislative search for a balanced, acceptable solution to Hawaii's residential leasehold problems took years of active study, discussion and debate. Legislative refinement of that solution is continuing today because it is Hawaii's state government and its people who will bear the consequences if the problem is not solved.[23] This degree of concern, attention and understanding cannot be devoted to these problems at the federal level.

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[23] See n.11, supra, regarding one such consequence, the Waiahole-Waikane confrontation.

(3) Decreasing harmful concentrations of resource ownership. There has been a long-standing policy against harmful concentrations of ownership and market power. This policy has been implemented by comprehensive federal and state legislative plans which provide various remedies including divestiture. See, e.g., 15 U.S.C. § 1, et seq., the Sherman Antitrust Act, 15 U.S.C. § 15, et seq., the Clayton Act, and Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-5 (1978) (judicial deference to authority of state to effect divestiture for purpose of enhancing economic competition).

The concentration of land ownership in Hawaii combined with the parallel residential leasing practices by the large landowners have already been found

by the legislature to be "oligogopolistic,"[24] and that finding has been confirmed by at least one court.[25] The legislative findings outline in some detail the harmful economic effects of this concentrated residential land market. One of the primary goals of the Act is to reduce this market concentration and thus alleviate the economic problems caused by it.

The Ninth Circuit's result is contrary to the strong policy against harmful concentrations of market power through resource ownership. In fact, it would perpetuate the concentration of residential land ownership by eliminating the tax shelter incentive for sale provided by the Act.

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[24] See n.3, supra.

[25] See id.

(4) Encouraging widespread home ownership. Encouraging widespread home ownership has been a long-standing policy goal of both federal and state government implemented by numerous government programs. See, e.g., 12 U.S.C. § 1701, et seq., the National Housing Act, 14 U.S.C. § 1441, et seq., the Housing Act of 1949.[26] In Hawaii, it

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[26] "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation."

42 U.S.C. § 1441.

has been elevated to the status of a constitutional mandate.[27]

The appellees' residential leasehold system defeats this policy in two ways. First, the large landowners have effectively deprived nearly one-third of the homeowners on Oahu of the right to own the land under their homes even if they can afford it. Second, the oligopolistic residential leasing practices of the large landowners has unnecessarily inflated the cost of <u>both</u> leasehold and fee simple housing. This further reduces the affordability of

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[27] "The State shall have the power to provide for, or assist in, housing, slum clearance and the development or rehabilitation of substandard areas. The exercise of such power is deemed to be for a public use and purpose." Hawaii Constitution, art. IX, § 5.

housing which is already a severe problem in Hawaii.

The Ninth Circuit's invalidation of the Act is in direct conflict with the policy of encouraging widespread home ownership and the many other programs designed to implement it.

(5) Effecting necessary social and economic changes by compensated takings rather than by confiscatory regulations. It seems preferable wherever possible to effect necessary social and economic changes by fully compensated takings using the power of eminent domain rather than by confiscatory regulation which often entails extensive and continued government involvement. The rationale are that it is fairer to compensate the class adversely affected by a governmental program designed to benefit others or society at large, and that

the transformation of wealth is preferable to its transfer. The Act conforms to this policy by transforming the large landowners' wealth from a socially undesirable investment into other investments rather than by transferring their wealth to others.

The Ninth Circuit's decision runs directly counter to all of these important judicial and social policy considerations as well as all relevant precedent while failing to cite any compelling reason for doing so. That court's clear departure from precedent and disregard for relevant policy considerations should therefore be disaffirmed.

C. The Hawaii Land Reform Act Falls Well Within Any Conceivable Parameters Of Permissible Public Purposes

The Ninth Circuit, not as familiar as was the district court with

the existence and extent of the residential leasehold problems confronting Hawaii and the long legislative evolution of the Act, has pronounced the existence of an inflexible rule regarding permissible uses of eminent domain. For it was only by "strip[ping] away" the Act's unrebuttled extensive legislative declarations of purpose as no more than "statutory rationalizations," and only by viewing no more than the Act's dismembered remnants, that the Court could avoid the conclusion that the Act fell well within any conceivable parameters of public purpose.

The simple truth, however, is that the Act was neither considered nor passed in such a vacuum. It was the result of intensive consideration and study spanning two decades. The legislative conclusion was that the residential leasehold system which had survived

to present-day Hawaii would be perpetuated by the appellees and their counterparts absent legislative action. The legislature concluded that it should not be allowed to continue because of the social and economic problems resulting from the inherent conflict between individual expectations of home ownership and the large landowners' expectations of a particular level of income. And the use of eminent domain to effect the Act's purposes was integral to the legislative solution, in fact having been suggested by the large landowners themselves.

In sum, given the nature of the problem and the widespread participation in the search for a solution, the Hawaii Land Reform Act likely provided not just one of many rational solutions,

but an optimum solution. It was tailored to address the problem, it provided detailed procedural steps, and it elected full compensation over uncompensated regulation.

If the United States Constitution allowed the State of Hawaii to take any action to address the problems created by the residential leasehold system, then the Act was it. If the power of eminent domain can ever be used to effect the compensated taking of private property interests and their subsequent transfer to other private persons, then the unrebutted public purposes of the Act provide the necessary foundation.

CONCLUSION

The transplantation by appellee and other large landowners of a unique feudal past into modern Hawaii has created a multitude of social and economic problems which are both widespread and pressing in nature. Active and prolonged legislative attention to these problems participated in by the appellees and other large landowners culminated in passage of the Hawaii Land Reform Act in 1967 and continues to the present. Now the Ninth Circuit forecloses this effort *in toto* by propounding an inflexible, hitherto unknown constitutional limitation on the use of the power of eminent domain. In the process, it ignores the fact that the stated public purposes for enactment of the statute far exceed any minimum standard of rationality applied by this or any other court to date.

To correct what may only be viewed as an aberration in the development of the law of eminent domain and an unnecessary excursion by the federal judiciary into state legislative matters, this Court should note probable jurisdiction and ultimately reverse the judgment below.

Respectfully submitted,

JAMES H. CASE
A. BERNARD BAYS
EDWARD E. CASE
Carlsmith, Carlsmith,
Wichman and Case
2200 Pacific Trade Center
190 South King Street
Honolulu, Hawaii 96813

Counsel for Appellants
Kahala Community
Association, Inc. and
Kahala Community Fee
Purchase Fund

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, et al.	)
Plaintiffs-Appellants,	)
vs.	)
PAUL A. TOM, et al.,	)
Defendants-Appellees,	)
and	)
WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,	)
Intervenors-Appellees.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Kahala Community Assn., Inc., et al.,

Intervenors-Appellees in this case, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Ninth Circuit entered March 28, 1983, rehearing denied by order dated June 17, 1983, reversing the Judgment of the United States District Court for the District of Hawaii entered June 10, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: Honolulu, Hawaii, July 18, 1983.

JAMES H. CASE
A. BERNARD BAYS
WILLIAM E. ATWATER

Attorneys for Intervenors-Appellees Kahala Community Assn., Inc., et al.